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**FILED**  
12:35 O'Clock AM

**FEB 22 2011**

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI**

**JEANNE HICKS, Clerk**  
By: Rita Storms

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: February 22, 2011

TITLE:

COUNSEL:

STATE OF ARIZONA

Sheila Sullivan Polk  
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Bill Hughes, Esq.  
Steven Sisneros, Esq.  
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

JAMES ARTHUR RAY

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Los Angeles, CA 90071

(Defendant)

(For Defendant)

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**RULING ON DEFENDANT'S MOTION IN LIMINE  
RE: EXCLUDING VICTIM IMPACT TESTIMONY**

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The Court has considered the motion, response and reply. The parties have not requested oral argument.

The parties agree that "victim impact" testimony would not be admissible. The State notes that it does not intend to present testimony of that type in its case-in-chief, implying that such testimony may be appropriate as rebuttal evidence. Whether testimony of any kind would be admissible in rebuttal cannot be determined, of course, until presentation of any defense evidence.

The State notes, however, that it intends to offer testimony from a representative of each of the alleged victim's families to establish relevant information regarding the deceased persons' "age, health, mental state, and the relationship/history with the Defendant." According to the State, "all of these facts are relevant to identify each victim,

complete the story and to aid the jury in understanding why the victims remained in the sweat lodge." Although there may be instances when testimony of this type could be relevant, this Court is unable to address issues of admissibility unless the specific proposed testimony is presented to the Court and the parties provide appropriate legal support for their positions. Without a statement of the specific evidence that may be offered, the Court is left to speculate regarding potential evidentiary issues. Nevertheless, the Court will attempt to provide some general guidance in order to expedite the presentation of evidence.

The Defendant argues that the "State knows well that the victims' identity, health, and mental state are not in dispute in this case." Generally speaking, the State cannot be forced to accept stipulations relating to the elements of an offense. *See State v. Coghill*, 216 Ariz. 578, 586-87, 169 P.3d. 942, 950-51 (App.2008). Although identity of a deceased victim would not appear to be an element of a homicide charge (as distinguished from situations where the age or other status of a victim may be an enhancement), it would also appear that the State must be allowed to prove the identity of the persons named as victims in the indictment.

The Court notes that calling family members of victims as witnesses could present concerns relating to the purpose of Rule 403 of the Arizona Rules of Evidence. The State could offer proof on the non-element, relevant facts of the identity and age of a victim through other evidence or by stipulation, means that would not risk presenting testimony in violation of Rule 403. This Court concludes, however, that in this instance it would not be appropriate to interfere with the manner in which the parties choose to present relevant evidence. The Court emphasizes, however, that victim impact testimony may not be presented in the guise or in the context of efforts to prove relevant but uncontested matters.

The Court notes that the State is suggesting that one family member for each of the alleged victims can cover relevant points in the areas of identity, health, mental state, and relationship with the Defendant. As discussed above, having a member of the family testify as to identity, while permissible, could raise concerns over potential violations of Rule 403. Testimony from family members in the other three areas designated by the State – health, mental state, and relationship/history with the Defendant – may also be problematic. For example, the Court is not clear how the State would provide foundation for a family member to testify regarding the health of an alleged victim. People may be guarded in discussing health conditions and concerns, even with family and close friends, or people may convey inaccurate information. And, other than general observations regarding the apparent state of health, which might be admissible under Rule 701, it would seem that such testimony would be based largely on hearsay.

The Court has noted that limited lay testimony relating to health "might" be admissible under Rule 701. The State does not explain in its response how the pre-incident health of the victims is relevant to a material issue in the case. The Court acknowledges that it has discretion in admitting appropriate "background" evidence in order to give the jury a meaningful context in which to determine factual issues. But irrelevant or unfairly prejudicial evidence does not become admissible solely by being given labels such as background evidence or *res gestae*. The Court has explained in a previous ruling its conclusion that the mental state of victims in a criminal case involving recklessness could be relevant, but the Court is unable to assume that lay testimony regarding the health of a


family member would "aid the jury in understanding why the victims remained in the sweat lodge." Again, evidence of the victims' health may be relevant and admissible, but this Court cannot speculate as to the actual evidence that will be offered and the potential legal basis for admissibility.

Rulings on any specific evidence going to the victims' mental state and to the relationship/history with the Defendant are subject to the concerns noted above. Possible issues relating to hearsay, relevance, Rule 403 balancing, or other evidentiary concerns cannot be addressed at this time.

Based on the agreement of the parties expressed in the motion in limine and response,

IT IS ORDERED *granting* the motion in limine and excluding victim impact testimony.

DATED this 22<sup>nd</sup> day of February, 2011.

  
**Warren R. Darrow**  
**Superior Court Judge**

cc: Victim Services Division